MICHIGAN SUPREME COURT

PUBLIC HEARING
May 21, 2008

CHIEF JUSTICE TAYLOR: Good morning. We're here today for our public hearing. There are nine items on it. Each speaker gets three minutes on each item for which they're listed. The lights here will help you along, and when the yellow comes on you have two minutes, and when the red comes on your time is up. Victoria Kremski please. Item number one.

ITEM 1 – 2004-08 – MCR 8.126 – State Bar Rule 15

MS. KREMSKI: Good morning. Thank you. Victoria Kremski appearing on behalf of the State Bar. We would just like to respond to the letter submitted to the Court by the Michigan Manufacturers Association. The first issue that the MMA raises is regarding the number of appearances under the pro hoc vice rule, and the important point from a regulatory standpoint is not necessarily what the number of appearances is, but that there is a reasonable number delineated so that the process is uniform and that there's not –

JUSTICE KELLY: Could you lift the mic up a little.

MS. KREMSKI: I'm sorry.

JUSTICE KELLY: Thank You.

MS. KREMSKI: The importance is to have an agreed upon number so that there is inconsistency among the courts within a state. The Representative Assembly's position is that three appearances is a reasonable number. The second issue involves the out-of-state attorneys, and the requirement that they submit certificates of good standing. The MMA has pointed out that that process might be burdensome for attorneys especially if there's a hearing that is exigent and needs to be heard quickly. Again, the RA's position was that submitting affidavits is sufficient. We would point out that the Representative Assembly's position called for the State Bar to act as the central clearing house that would be able to verify the information contained in that affidavit so that the local courts would be apprised that indeed the attorney is in good standing in the state –

JUSTICE CORRIGAN: Ms. Kremski do we have any idea at all how many of these pro hoc vices there are in Michigan –

MS. KREMSKI: We do not.

JUSTICE CORRIGAN: and what sort of burden we're looking at?

MS. KREMSKI: We do not, and that is the –

JUSTICE CORRIGAN: So the bar would undertake the investigation on these – all these affidavits, and we don't know for example on the state line up in the UP how many of these there really are do we?

MS. KREMSKI: That's right.

JUSTICE CORRIGAN: Or between Toledo and Monroe.

MS. KREMSKI: When we discussed it in house we weren't certain whether we would completely need to add a new employee position to handle this or what we would be looking at.

JUSTICE CORRIGAN: Okay.

MS. KREMSKI: Otherwise I would simply refer to the letter of March 20th from Janet Welch, our executive director, regarding the other issues.

JUSTICE YOUNG: Can I ask you? Is not a certificate of good standing required for every other admission in the state?

MS. KREMSKI: Every other admission in the state?

JUSTICE YOUNG: Under – yeah, under Rule 15.

MS. KREMSKI: Not that I'm aware of.

JUSTICE YOUNG: When you're not taking the exam, and going through the character and fitness process.

MS. KREMSKI: Oh, I see. If you were applying for admission if you were an attorney licensed in another state?

JUSTICE YOUNG: Um hmm.

MS. KREMSKI: Yes, I believe that that is required.

JUSTICE YOUNG: So why would we make an exception here?

MS. KREMSKI: Because it would – it goes to the different nature of the character and fitness proceeding versus a litigation proceeding.

JUSTICE YOUNG: No, I'm talking about – I'm not talking about a new applicant, I'm talking about an experienced lawyer licensed somewhere other than in Michigan. We require, I believe, a certificate of good standing from every bar in which they're admitted for the protection of the public. Why would we accept those seeking pro hoc vice (inaudible)?

MS. KREMSKI: Because the application – the admission process for an out-of-state attorney takes much longer than what you would need to have in a litigation setting where clients may need to have access to a court of justice very quickly and want to have the attorney of their choice be able to represent them.

JUSTICE YOUNG: So we're less concerned about the public interest when it's a pro hoc vice.

MS. KREMSKI: Well, that's where the representative assembly's proposal that called for an agency to verify the information contained in the affidavit.

JUSTICE YOUNG: That's not any different than trying to waive in. You have to attest that you are in good standing, but you also have to get a certificate.

MS. KREMSKI: Well, my understanding is that it's sometimes very time consuming to get certificates from – certificates of good standing from other states that it can take weeks. And I am sure that there could probably be a compromise position where if the attorney presents with exigent circumstances that they sign the affidavit, and then submit the certificates of good standing later on. That could be a possible resolution to that issue.

JUSTICE CORRIGAN: Can I ask two other practice questions I guess? First of all, are we aware that our disciplinary bodies are having to cope with misbehavior by out-of-state attorneys?

MS. KREMSKI: The last I know Justice is when I spoke with John Van Bolt and Robert Agacinski, now this was at least a year and a half ago, they indicated that they did not have a whole lot of issues with attorneys appearing on a pro hoc basis.

JUSTICE CORRIGAN: Okay. My second question is this. Out-of-state definition includes foreign lawyers. That includes lawyers from all over the

world, and as we know the global practice of law is hopefully coming to out state as well. Do we know whether we're having lawyers from around the world apply under these pro hoc vice provisions, and how they work with the courts of those countries? Do we have any idea?

MS. KREMSKI: I have no –

JUSTICE CORRIGAN: And in your thinking about this at the State Bar have you looked at the issue of global practice of law and lawyers from Japan, China, India, and some of the countries that are coming to Michigan? Have we looked at that particularly to see how our – your recommendations track against the real life human beings from those countries who are coming here?

MS. KREMSKI: In terms of data, the last time we looked at that was back in I think 2004 when this package went up. I personally am not aware of (inaudible).

JUSTICE CORRIGAN: Okay, because we have several law firms in Michigan now who are involved in this sort of practice. Okay.

MS. KREMSKI: Okay, thank you.

CHIEF JUSTICE TAYLOR: David Grande-Cassell.

MR. GRANDE-CASSELL: Good morning Mr. Chief Justice and members of the Court. My name is David Grande-Cassell, and I'm here on behalf of the Michigan Manufacturers Association. The MMA is concerned primarily with the proposed limit on the number of admissions under the new rule. A number of our members have expressed concern that three admissions would limit their ability to pursue the national consistent litigation strategies they've developed relating to the products that they manufacture. Two members in particular have specified that they have had more than three pro hoc vice admissions in the state of Michigan in recent years, and this limitation gives them pause because the attorneys that they have hired on these things work on these cases not only here in Michigan but everywhere else. The attorneys know the –

JUSTICE YOUNG: Can I ask you then what is the – I mean Michigan Manufacturers' theory of the office of the pro hoc vice admission? Does the association view pro hoc vice as an end round-around the licensing requirements of the state of Michigan?

MR. GRANDE-CASSELL: No, not at all Justice Young.

JUSTICE YOUNG: Well, what is the theory? I mean I think the idea is that this is an exception, and a rarely used exception, and I guess I'd want to ask you why if a company has a recurring need for a particular attorney aren't they urging that attorney to become generally licensed in this state?

MR. GRANDE-CASSELL: Not really insofar as the licensing process does take a long time, and it's not –

JUSTICE YOUNG: Yeah, but wait a minute. You get to come in pro hoc vice three times in one year. It seems to me you then have, if you can anticipate you're gonna have a serial number of cases here, you then move generally for admission. What's wrong with that approach?

MR. GRANDE-CASSELL: Well, because it is more than just a Michigan problem; it would be a problem all over the country. And individual attorneys would be required to be –

JUSTICE YOUNG: But none of your constituent members can open up a business here without doing some licensing with the state of Michigan either right?

MR. GRANDE-CASSELL: That's correct.

JUSTICE YOUNG: Okay, well, why are lawyers different than your clients – than your association members?

MR. GRANDE-CASSELL: Well, again, we're not asking for a general waiver of the admission requirement. The MMA recognizes that some reasonable limitation would be appropriate, and in fact the number that was bandied about among our members was seven or eight appearances in a year would be consistent with the practice that they have – they've seen over the last several years.

JUSTICE YOUNG: Have you presented any data that shows that there are some states that allows as many as seven admissions in a year?

MR. GRANDE-CASSELL: No, however, the American Bar Association has done a study of all of the pro hoc vice admission requirements nationally, and I believe only seven jurisdictions nationally provide for specific limitations, and most of the rest of them simply leave it within the discretion of the court. Among those states that do provide specific limitations –

JUSTICE YOUNG: Alabama has five, that's the largest number in a twelve-month period. I guess Nevada allows five over a three-year period. Virginia – I'm sorry; Virginia has twelve appearances in twelve months.

MR. GRANDE-CASSELL: Yes, and Montana has two lifetime appearances. I believe there's another one and I don't recall off the top of my head that has a dozen, but the vast –

JUSTICE CORRIGAN: So your position would be it's just better to leave pro hoc vice in the discretion, and don't put any limit on it. What about the disciplinary provisions of this rule and the fees being paid for that? Is there any objection by the MMA to that?

MR. GRANDE-CASSELL: Not at all in that you know the incoming attorneys do need to submit themselves to the disciplinary jurisdiction of the state. I personally practice in a number of different jurisdictions, and in every one of those I'm subject to discipline within those states. So I don't think the MMA has any –

JUSTICE CORRIGAN: Does New York have a limit on the number of times people can come in or California?

MR. GRANDE-CASSELL: California is within the discretion of the courts, and New York, if you'll bear with me for a second, is within the discretion of the court.

JUSTICE CORRIGAN: Okay, thanks.

JUSTICE KELLY: And Wisconsin, Ohio, Indiana – the neighboring states to Michigan – don't have any limitation do they?

MR. GRANDE-CASSELL: Bear with me for a second here I need to get through the matrix. Wisconsin is in the courts discretion. Pennsylvania is the courts discretion. Ohio is the courts discretion. Minnesota's the courts discretion. Illinois is the courts discretion. Indiana's the courts discretion.

JUSTICE YOUNG: Let me ask you a question that that raises. It seems to me one of the issues that we're confronting is under the current Rule 15 we have no idea how many admissions pro hoc vice are occurring today. And it strikes me that if we leave to the individual trial judge's discretion to admit pro hoc vice, we could have somebody practicing in affect a general practice in Michigan without regulation because you can go to Wayne County, and go to Alpena, you can

practice everywhere, but no one knows how many times a lawyer is actually appearing. Isn't that a concern?

MR. GRANDE-CASSELL: I think that is an accurate statement; I don't believe that that data is collected at all.

JUSTICE YOUNG: I know, but not only that there's no regulation on that.

JUSTICE CORRIGAN: Wouldn't that – I'm sorry – Wouldn't that data be collected if there were a disciplinary aspect to this and a fee assessed so we would know that in future how many there really are?

MR. GRANDE-CASSELL: Yeah, I'm – although I'm not familiar with the mechanics of that my guess is that yes, you could probably figure that out. And I – again, the MMA would support a reasonable limitation, and again, in conversations with our members that are concerned about this the number of seven or eight admissions was something that was discussed as being consistent with their actual practice.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE TAYLOR: Thank you sir.

MR. GRANDE-CASSELL: Thank you.

CHIEF JUSTICE TAYLOR: We move to Item No. 2, the joinder of counterclaims, Sean McNally.

ITEM #2 – 2005-25 – MCR 2.203 - JOINDER OF COUNTERCLAIMS

MR. McNALLY: Good morning Mr. Chief Justice and may it please the court. I am Sean McNally, and I'm appearing on behalf of the State Bar of Michigan's Civil Procedure and Courts Committee this morning in opposition to the proposed amendment to MCR 2.203(a). The proposed amendment purports to bring the standard for a counterclaim, whether it's permissive or compulsory, into line with federal rule 13 making it a compulsory counterclaim requirement. There are a few concerns with this that the committee was able to identify, and are articulated in our comment to the Court on this proposed amendment. One that there's a longstanding history for the standard that's currently in the court rule in Michigan. Since the court rules were adopted in 1985 that's been the standard, and that standard preceded the adoption of the court rules that occurred in 1985. When looking to the staff comment in the amendment, there is no apparent problem that

is identified, and as we discussed this issue amongst the judges and attorneys on the committee we were not able to identify a problem that would necessitate this change. The second primary issue that we have with this proposed amendment, and this was provided in the comment as well and was also captured in the comment of the Michigan Defense Trial Counsel, is that for defense attorneys who have cases where there is an alleged insured loss they have a duty to defend their client within the scope of the policy. This puts them in a position, the awkward position, when the file is brought in to have to deal with, both ethically and legally, advising the client on what the potential counterclaim is and – see you have that initial issue, but then later on in the case if the counterclaim is asserted you could have strategic decisions being made by the insurance carrier –

JUSTICE CORRIGAN: Mr. McNally accepting that all those are issues would it not be enough to create an exception in that area? In other words carve out the insurance issue from the rule.

MR. GRANDE-CASSELL: I think that that might be a little bit difficult to do. I mean it's such a widespread issue. I mean you have cases in injury, you have commercial cases with property damages where you have a CGL policy, I mean there's so many situations where –

JUSTICE CORRIGAN: Where you've got insurance (inaudible) –

MR. GRANDE-CASSELL: Where the insurance is going to be (inaudible).

JUSTICE CORRIGAN: Are you familiar in the federal rules with the omitted counterclaim provisions that are – that the federal rules permit – counterclaims to be raised later if they're missed on a showing of good cause or excusable neglect?

MR. GRANDE-CASSELL: Well, I think that's certainly the standard under the federal rule, and I think that you could employ a standard as well in the Michigan rule if it were amended.

JUSTICE CORRIGAN: Is the committee, your committee, familiar with the fact that Michigan is out of whack with the rest of the country on this rule, and that the you know Professor Martin et al suggested that we have a compulsory counterclaim rule?

MR. GRANDE-CASSELL: We did understand there was some discussion that that is the federal standard in the you know prevailing standard –

JUSTICE CORRIGAN: And the national standard.

MR. GRANDE-CASSELL: And the national standard.

JUSTICE CORRIGAN: And the rules committee that wrote the rules recommended it so.

CHIEF JUSTICE TAYLOR: How do they handle this in the federal courts they have people doing insurance defense work there?

MR. GRANDE-CASSELL: I would agree with that. I just – our opinion was that the frequency of insurance –

CHIEF JUSTICE TAYLOR: How do they handle it?

MR. GRANDE-CASSELL: What's that?

CHIEF JUSTICE TAYLOR: How do they handle it in the federal system?

MR. GRANDE-CASSELL: In that situation I can tell you from my own experience in the commercial aspect with the CGL policy or something either the attorney has to enter into a separate engagement with the client on the issue of the counterclaim because of if the duty to defend or indemnify goes away I mean they need a separate engagement, or hiring a separate attorney. Typically in cases where there is a coverage issue or a counterclaim asserted in a case that I would be involved in there may be two attorneys – one retained and assigned by the insurance company –

CHIEF JUSTICE TAYLOR: So is the distinction then that in the federal courts the claims are so large that this makes sense, or is it the point that it doesn't work in the federal system? I mean you're saying, I think a fairly strong argument, this seems like a real problem for people who do insurance defense work in Michigan yet it must be working in the federal system. So I'm trying to figure how, may be it isn't working, perhaps one, or alternatively, the claims are so large or something of that sort that it does work.

MR. GRANDE-CASSELL: You do have in a diversity case – I mean you've got the threshold of $75,000 so you're at a higher level of claim, and so economically it might make more sense. In state court you have two issues. One higher frequency of insurance issues in cases, and two you can have a much smaller amount in controversy. I mean you can have district court cases where there's an alleged insured loss –

CHIEF JUSTICE TAYLOR: I understand that. Would that – is what you're saying then that the smaller claims that would likely be seen in the state courts make the system which works in the federal system not workable here?

MR. GRANDE-CASSELL: Correct. It might be economically impractical.

CHIEF JUSTICE TAYLOR: Did your committee look at that or - was this something they looked at?

MR. GRANDE-CASSELL: I can't tell you there was an in-depth study done. I mean this is a group of judges and practicing attorneys from a wide sector of practice sitting around discussing these issues for fifteen to twenty minutes. And that's what led us to identifying these issues, and –

CHIEF JUSTICE TAYLOR: So it's sort of an impressionistic thing.

MR. GRANDE-CASSELL: Correct. There's no empirical data that we go out and gather unless –

CHIEF JUSTICE TAYLOR: Does anybody feel ownership of this – I mean I've been in groups like this. Is there anybody who feels ownership to come up with a serious analysis of this or is this just a group of guys having coffee and say let's not do it.

MR. GRANDE-CASSELL: No, in some circumstances there will be a special subcommittee appointed. For example, when the electronic discovery issues were being proposed for their implementation of the Michigan court rules we did a very in-depth analysis in looking at what was adopted in the federal court. But here – I mean these were the issues that we would be able to identify, I mean the Michigan Defense Trial Counsel's identified the same thing, and that led us to not want to disrupt this longstanding standard in Michigan.

CHIEF JUSTICE TAYLOR: Thank you sir. I guess you're a witness on number three too – motions for reconsideration.

ITEM #3 – 2005-36 – MCR 2.119 etc. – MOTIONS FOR RECONSIDERATION

MR. McNALLY: Once again Sean McNally appearing on behalf of the State Bar of Michigan's Civil Procedure and Courts Committee. The amendments that are proposed – and I'll take these in order – MCR 2.119(f) which is the timing

requirement for a motion for rehearing and/or reconsideration now being 21 days. The committee supported that and saw that as a sensible change. What was problematic is the time period that is proposed in §7.204(a)(1)(b) and then 7.205(f)(3)(b) that have to do with extending the time to either file a claim of appeal or an application for leave to appeal if a post-trial hearing or – post-trial or hearing motion for reconsideration or something like that is filed. In the proposed amendments, the Court is proposing to strike the following language "or within further time the trial court may have allowed during the 21 day period." In our comment to the Court, we have provided alternate language keeping that language in the rule and adding a good cause requirement. And I'll give the Court a couple of examples of why a trial judge should be able to have discretion to extend that period of time. Suppose we have a six-week trial with complicated expert testimony, and the judge has to assess under MCR 702 and 600.2955 on the expert's qualifications and the admissibility and reliability of that testimony. At the end of the trial one of the parties had moved to strike the expert because they didn't believe the testimony met the criteria and was inadmissible, they want to file a motion to have that denial of the motion to strike reconsidered, but yet the court reporter can't get the transcript from that six-week trial around for a period of four weeks. In that circumstance, we would submit that that's good cause that should allow the trial judge to have some discretion to extend that period of time. You can cite other examples such as the attorney being ill, the judge getting ill, the attorney's office burning down. We thought that it was critically important to put that type of discretion upon a good cause showing in the rule allowing the period to either file the claim of appeal or the application for leave. And also we in our comment have submitted a corresponding change to MCR 2.614(a)(1) which has to do with stays of execution to accommodate the language that we're suggesting for 7.204 and 7.205. If the Court has any questions, I'd be happy to answer them.

CHIEF JUSTICE TAYLOR: Thank you. We'll move on to Item #5 – default judgments. You can just take a seat over there Mr. McNally, you'll be back in a moment. Michael Buckles.

ITEM #5 – 2006-10 – MCR 2.603 – DEFAULT JUDGMENTS

MR. BUCKLES: Good morning your honors. My name is Michael H.R. Buckles I'm a practicing attorney in Beverly Hills, Michigan, I'm also the government affairs director for the Michigan Creditors Bar Association. MCBA is approximately 55 law firms. We specialize in collection of debt on behalf of creditors, and we file probably the majority of civil actions in the district courts in the state of Michigan. We're asking for a change to the provision in 2.603, and have it defined more thoroughly. And, in fact, after reviewing this with Anne Boomer and also reviewing the court rules for the sister states, Ohio, Indiana, Illinois, Iowa, and Wisconsin, I would go one step further and ask the Court to

consider eliminating the cancellation provision entirely. At the very least relegate it to negotiable instruments. But the federal rule and all of our sister states except Iowa, which by the way is what the Michigan rule is based on, none of them have this cancellation provision at all, and it creates consternation among the courts and the clerks. How many times in law school did we try to decide what a negotiable instrument was – a writing, a promise to pay some certain (inaudible) of date, payable to order, demand – to have a clerk decide whether this is –

JUSTICE KELLY: Well, we could define that – Excuse me Mr. Buckles. We could define that, and I thought the purpose of having the cancellation clause was to make sure that a true negotiable instrument couldn't be used after the debt had been satisfied.

MR. BUCKLES: That is the purpose your honor; it's to protect another holder. But in today's day and age in commercial transactions, most of these negotiable instruments are not being passed around from person to person. Most instruments are kept by a bank, or credit union, or kept in a safe and used for security for accounts receivable. I understand the purpose behind it, and at the very least I'd like to limit this, if we're going to limit it, to negotiable instruments. Again, that presents some consternation for the court clerks, but the confusion now is when we file a complaint – let's say on a credit card, I represent credit card companies – and I attach a copy of the card member agreement and the statement of account, under 2.113 that requires we do that when we're filing an action based on a written instrument, then I file an application of default saying it's not based on a written instrument it gets confusing, because it's not based on the narrow definition of negotiable instrument and therefore I have complaints returned and some times courts think I can't get the judgment interest of Chapter 13 percent under the judgment interest statute because they say it's not based on a written instrument. We have to understand, and the clerks don't, that written instruments is a gigantic – it could be an insurance agreement under the *Aldo* (phonetic) decision that this Court entered in '97. But a negotiable instrument is very, very narrow. So I would ask at the very least that we narrow it to negotiable instruments only. Or consider the broader provision that we have in federal courts and our sister states to eliminate it entirely. Balancing the consternation, the problems that the clerks have, the volume of cases that (inaudible) exponentially in the credit world of filing cases - now I'm part of that situation – with the minor possibility that there might be some holder of that note at some point that might be trying to collect on that particular instrument. I think in the balance if we look at what the sister states have done and the federal government – the federal rules are that we just eliminate the cancellation provision entirely. Short of that, I would implore the Court to at least limit it to negotiable instruments. And if you go one step further, if you do limit it to negotiable instruments, and I have a possible wording, perhaps say a negotiable instrument as defined in MCL 440.3104, which

is our Uniform Commercial Code section that does define negotiable instruments. Of course, then you've got the clerk going back again trying to figure out whether or not this is a negotiable instrument or not. I see my time is up so thank you very much for your time. I appreciate your consideration.

CHIEF JUSTICE TAYLOR: Thank you. Mr. McNally.

MR. McNALLY: Sean McNally appearing on behalf of the State Bar of Michigan's Civil Procedure and Courts Committee. The committee opposes the amendment to MCR 2.603 adding the language of negotiable instrument, and - for essentially two reasons, one being the confusion that may occur with the clerks as to what constitutes a negotiable instrument. I mean are they to pull out MCL 440.3104 and look through the criteria and make a determination about whether a certain written instrument constitutes a negotiable instrument. The second –

CHIEF JUSTICE TAYLOR: Can I interrupt you for a moment sir?

MR. McNALLY: Yes.

CHIEF JUSTICE TAYLOR: Your position is you want to have no requirements that anything be filed or you want to leave the rule unchanged?

MR. McNALLY: We have not taken a position to strike the language that currently exists in 2.603 which is the promise to pay or other written form of indebtedness. We've only said that the change for a negotiable instrument may be problematic.

JUSTICE YOUNG: Do you see any problem with the existing rule? I mean you're not – you're coming here taking a position but not helping.

MR. McNALLY: My own personal view is that the language currently –

JUSTICE YOUNG: Well, your personal view – okay, is one thing, but the Bar has not –

MR. McNALLY: They have not taken a position on it.

JUSTICE YOUNG: That's not very helpful to the Court. I mean I guess what we're looking for when we publish these rules is one an acknowledgement is the rule change addressing a problem, and if it does – if there is a problem, is this the right solution. You're coming here without addressing question one.

JUSTICE KELLY: Well, I have a question. What is difficult about figuring out whether something – if it's a traveler's check, or a regular check, a cashier's check, a certificate of deposition, a money order – these are all negotiable instruments right? Is a clerk gonna have a hard time figuring out what's a negotiable instrument?

MR. McNALLY: Well, the attorney's might not, but the clerk may.

JUSTICE KELLY: Clerk – the clerk's gonna have a hard time figuring that out?

MR. McNALLY: Well, I think further either a cross-reference to the section of the Uniform Commercial Code –

JUSTICE KELLY: Right.

MR. McNALLY: or a further definition would be helpful.

JUSTICE KELLY: Yes, and we were talking about – the suggestions been made to use the definition that appears in the statute, and I thought I heard you say it would be confusing for the clerk to have to pull out the statute and figure out if a check is a negotiable instrument looking at the statute.

MR. McNALLY: Well, our discussion as it relates the clerk was that this new language could possible create some confusion putting the clerk in the position of having to take a specific you know attachment to a default judgment and making a determination about whether it constitutes a negotiable instrument or not.

JUSTICE KELLY: And why would that be confusing if the clerk had the court rule to look at?

JUSTICE YOUNG: And the statute.

JUSTICE KELLY: And the statute.

MR. McNALLY: It just once again puts them in the position of making that decision, and may be that all bodes towards –

CHIEF JUSTICE TAYLOR: Isn't it likely the clerk is going to err on the side of not making a mistake so she's gonna – he or she is gonna then insist that the thing be attached right when it's a close question at all?

MR. McNALLY: That's fair.

CHIEF JUSTICE TAYLOR: What's the – maybe you don't know I don't know – I mean what's the impact on that. Maybe Mr. Buckles could help us on that. If you would come up Mr. Buckles, I just have a question for you I guess. My concern is that you're probably gonna have clerks not wanting to blunder so they'll err on the side of attaching something that might or might not be needed. Do you agree?

MR. BUCKLES: What will happen, what has happened your honor, is the clerks return the default judgments to us because they – currently under the rule they don't know what we're suppose to attach. I keep arguing it's only a negotiable instrument; I get some district judges that say the court rule doesn't say that get the court rule changed which is why I try to do that. I really think we shouldn't have a cancellation provision at all, but if you're asking me what the clerks will do I will tell you what problem it causes. The problem it causes is hundreds and hundreds of default judgments that are coming in and then looking at each one and trying to figure out what this is. Now if they got some direction from their chief judge that said look, the credit card agreement, a statement of account, is not a negotiable instrument, then they would probably have consistency in that respect. And again, as Justice Kelly mentioned, if they have a check, or money order, or a traveler's check, or a bearer bond – it gets a little confusing if you get to that point – then they can go to the judge and they could say is this a negotiable instrument. What we're finding, and this is one of the issues that came up with the 46th District Court and the rule that we're working on cooperatively with them, is that there's such a high volume of default judgments that are coming in that it is exhausting the district judges' time too trying to figure out what – we're trying to get some uniformity going on. So to answer –

JUSTICE CORRIGAN: Mr. Buckles just so I'm gonna cast an intelligent vote on this sir, am I correct in the understanding that Michigan adopted – we adopted this Iowa rule in order to protect third-parties not debtors is that right?

MR. BUCKLES: That's my understanding; it's the holder of the note.

JUSTICE CORRIGAN: Okay, I want to know if Mr. McNally agrees with that take on why that was done. This was an effort by the Court, adopting the Iowa rule, to protect third-parties in the world at large not the debtor in front of the court.

MR. McNALLY: That's correct.

JUSTICE CORRIGAN: Okay.

CHIEF JUSTICE TAYLOR: Thank you gentlemen.

MR. BUCKLES: Thank you.

MR. McNALLY: Thank you your honor.

CHIEF JUSTICE TAYLOR: Mr. McNally your next performance is in Item #6 – Stays in Governmental Immunity Cases.

ITEM #6 – 2006-11 – MCR 2.614 etc – STAYS IN GOVERMENTAL IMMUNITY CASES

MR. McNALLY: Thank you Mr. Chief Justice. Sean McNally appearing on behalf of the State Bar of Michigan's Civil Procedure and Courts Committee who is opposing an automatic stay in a situation where there is a claim of appeal based upon a denial of governmental immunity. The concern that the committee had was that the stay should be instituted by an order opposed to just having it be an automatic stay because you could have a motion for summary disposition that could blend several issues under the (C)(7) example for governmental immunity - a (C)(8), a (C)(10) - and so in that scenario the parties, litigants, attorneys, may not have a clear definition as to what's occurred in the trial court's order in response to that motion and therefore put the trial court or the Court of Appeals in a position of issuing an order. If there's any questions, I'd be happy to answer them.

CHIEF JUSTICE TAYLOR: Well, let me see if I understand the problem here. The government either wins or loses at the trial court on their motion. They want to take an appeal which we have given them the right to do interlocutorily, and is it the concern that you don't want the show to go on while the case is up on appeal on the motion?

MR. McNALLY: Absolutely.

CHIEF JUSTICE TAYLOR: Now how much – I mean why wouldn't you just say it's an automatic stay? What is it that could be possibly accomplished by having it be something other than automatic?

MR. McNALLY: I'm not advocating, or the committee's not advocating a position where we think that the case shouldn't be stayed if there's been a denial of governmental immunity and it goes up on appeal. It's a –

JUSTICE YOUNG: Why isn't that, the fact that the appeal itself sufficient notice to everybody, that everybody out of the pool in the trial court?

MR. McNALLY: Well, there could be a scenario where it – the denial wasn't necessarily based on governmental immunity. They file a claim of appeal, later on it's dismissed by the Court of Appeals for a lack of jurisdiction, and they indicate that you should file a delayed app for leave. It's just in that situation we're – I think what the committee is suggesting is not a huge change I mean almost a presumption of automatic stay, but it would by order of the court as opposed to just being automatic.

CHIEF JUSTICE TAYLOR: That would mean that without an order the action could continue.

MR. McNALLY: That's correct.

JUSTICE YOUNG: Which is the evil that the original rule was intending to avoid where the trial court essentially ignores the governmental immunity and continues to process the case.

MR. McNALLY: I think that the – either the trial court or the Court of Appeals should be put in the position to be able to issue that order. I think – and what we're advocating –

CHIEF JUSTICE TAYLOR: Isn't that – I mean I understand what you're saying it's not a bad idea, but it just seems to me it's costly for litigants. I mean now the government has to have a lawyer, draft an order to grant the stay, and if somebody's being difficult you could actually have to have a hearing on that and so on. I mean it just seems that's costly to litigants for no point.

JUSTICE YOUNG: Especially since we made the interlocutory appeal automatic.

MR. McNALLY: I understand that. This was only in the narrow circumstance where the litigants didn't receive a clear indication from the lower court, and there was several issues presented by a motion of the governmental body.

JUSTICE YOUNG: Then why isn't the default position the better position in default, than the party who believes that the basis for the interlocutory appeal hasn't been satisfied to move to make that clear?

MR. McNALLY: That would be one way to deal with it.

JUSTICE YOUNG: Well, but that is the way to deal with it given this rule. If it's – the stay is automatic and the basis for the stay is not laying by the trial court's decision, then the proper action is to move – the other party to move to say wait a minute, there's been no disposition on the governmental immunity issue which would qualify for the automatic interlocutory appeal.

MR. McNALLY: That would –

JUSTICE YOUNG: That's the default position. If the appeal has been taken improvidently, then it would seem to me the other party would have a strong motivation to make that clear.

MR. McNALLY: I believe that either way would work.

JUSTICE YOUNG: But I'm suggesting with this change that is the way right?

MR. McNALLY: The only caution I have with that are motions that you know present several issues.

JUSTICE YOUNG: No, no, I understand that. We have a trial court that makes a determination the governmental entity thinks that governmental immunity has been implicated and files the appeal; the case is automatically stayed under this proposed rule. I'm suggesting to you that under the circumstance where the nonappealing party believes that there has been an improvident appeal they will move to make that clear.

MR. McNALLY: And the committee felt it was more appropriate to suggest that an order be entered issuing that as opposed to being automatic.

JUSTICE YOUNG: I understand, but let me ask you the question. Isn't that what would happen if this version of the rule is approved?

MR. McNALLY: The party would have – they could file a motion to try to dissolve the automatic stay; they may have some difficulty getting that accomplished.

JUSTICE YOUNG: Why?

MR. McNALLY: The trial judge - I'm sorry (inaudible).

JUSTICE YOUNG: If the trial judge agrees that he or she did not rule on governmental immunity, why is that a difficulty?

MR. McNALLY: The trial judge may say the case is stayed I'm not gonna do anything until I get an indication one way or another from the Court of Appeals.

JUSTICE YOUNG: Okay.

MR. McNALLY: That's what – that's my response – that's what I would think would eventually happen.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE TAYLOR: Thank you.

MR. McNALLY: Thank you.

CHIEF JUSTICE TAYLOR: Off to number 7 the rules with regard to default and dismissal.

ITEM #7 – 2006-32 – MCR 2.504 – DEFAULT/DISMISSAL

MR. McNALLY: Good morning Sean McNally appearing on behalf of the State Bar of Michigan's Civil Procedure and Courts Committee once again. This proposed amendment to MCR 2.504 is, as far as my tenure on the Civil Procedure and Courts Committee for three years, was the most hotly debated and opposed amendment to the court rules that I think that I've experienced. With respect to subsection (1), this would allow the trial judge to sua sponte dismiss or enter a default for a party's failure to comply with either the court rules or with a court order. We believe very strongly that one that abuse could occur with this sua sponte provision, but two that already adequate measures exist both in the court rules and the trial judge's power of contempt.

JUSTICE CORRIGAN: I don't understand why this rule isn't an implementation of the *Maldonado* case where we said that there was inherent authority to do this why it wouldn't be adopted per se in a court rule to recognize the power of the court.

MR. McNALLY: Our committee believed that the power – that power as is referenced in the cases are already inherent in the existing court rules.

JUSTICE YOUNG: Then why are you opposing it as an encouragement of bizarre behavior on the part of judges?

JUSTICE CORRIGAN: You believe judges will abuse this provision in other words.

MR. McNALLY: That was our primary concern with this first provision that there is –

JUSTICE YOUNG: The rule manifestation of the inherent power recognized in *Maldonado* would encourage judges to abuse their discretion.

MR. McNALLY: Yes, this provision is so broad – I mean when you take a – specific examples from the court rules like discovery sanctions or something like that, or a specific contempt issue, I mean those powers already exist, and we felt that this was broader and gave the trial judge –

JUSTICE YOUNG: Than *Maldonado*?

MR. McNALLY: This is just a very broad provision that the committee was (inaudible) with.

JUSTICE YOUNG: As much - is it inconsistent with *Maldonado?*

MR. McNALLY: I do not believe it is inconsistent with *Maldonado*.

JUSTICE CORRIGAN: Has the trial –

JUSTICE YOUNG: Then what are we talking about?

JUSTICE CORRIGAN: Has the trial bar seen a lot of abuses since the *Maldonado* case?

MR. McNALLY: No one at the committee at this meeting when this was discussed cited any specific examples that I was aware of.

JUSTICE YOUNG: Let me understand what you're arguing. You're not arguing that the rule is inconsistent with our decision, you just don't want the judges to know about it by having it embedded in the rule.

MR. McNALLY: I don't think that's a fair characterization I'm saying.

JUSTICE YOUNG: Well, how is it different then?

MR. McNALLY: I think the inherent power that's in that decision and that's already contained in the provisions of the court rules. More importantly – I see that my time is expiring may I can continue on this point?

JUSTICE YOUNG: I want you to answer the question. Why is a frank expression in the rules of *Maldonado* an encouragement to an abuse of discretion?

MR. McNALLY: We believe that the power – what's already provided for in the court rules and the power of contempt is sufficient, and this is just going to be – there's just too much opportunity for abuse by trial judges.

JUSTICE YOUNG: Okay.

JUSTICE MARKMAN: Why are you concerned about potential abuse of discretion with regard to this proposed rule where as in Item #3 you're quite supportive of judges having the discretion for good cause shown to extend the time period? Why is there less abuse – why is there less potential for abuse of discretion in the context of 3 than there is here?

MR. McNALLY: I think in 3 obviously - the good cause requirement - that would be something that would be subject to further litigation as to what would be defined as good cause under that situation. Just here in this scenario it does – it's just everyone's reaction was it gives – there's just an opportunity for abuse.

JUSTICE YOUNG: Yeah, but that's what *Maldonado* allows. I mean the possibility the judge will improvidently use their discretion.

MR. McNALLY: I understand that; maybe this is the reaction from the – some selected members of the bench and some selected members of the bar that that discretion should be limited in this type of stock makes the attorneys and the other judges in fact uneasy.

CHIEF JUSTICE TAYLOR: Okay.

MR. McNALLY: Thank you.

CHIEF JUSTICE TAYLOR: Let's go to Item #8 – objections sanctions.

ITEM #8 – 2007-09 – MCR 2.306 - OBJECTIONS SANCTIONS

MR. McNALLY: Mr. Chief Justice which one was that?

CHIEF JUSTICE TAYLOR: Number 8 the – MCR 2.306.

MR. McNALLY: Oh, that's what I thought. Once again Sean McNally appearing on behalf of the Civil Procedure and Courts Committee to the State Bar of Michigan. We with these proposed amendments to the oral deposition court rule saw this as an opportunity to incorporate some of the very useful provisions that are contained in the federal court rules. We have provided via a comment an alternate proposed version of MCR 2.306. One issue that we did have with the language that the Court is proposing is in §2.306(d) regarding objections. The language that is suggested, and this is somewhat abbreviated, is any objection must be stated concisely and in a nonargumentive manner. That phrase the committee believed would lead to litigation – and I guess the reaction was is that objections by their very nature are argumentative, and so what we have proposed in the alternative is the word "civil," that they be in a civil manner. When you go down further in our comment to the Court you will see –

JUSTICE YOUNG: You understand – do practitioners not understand what an argumentative objective is? It's what we call speaking objection where you're educating the deponent to shut up.

MR. McNALLY: That's a concern I understand that.

JUSTICE YOUNG: Well, I'm just saying the idea that a civil objection addresses an entirely different question than the speaking objection.

MR. McNALLY: That –

JUSTICE YOUNG: You can make a very civil speaking objection so using civil doesn't really address the concern.

MR. McNALLY: Well, I understand the concern –

CHIEF JUSTICE TAYLOR: It's the instructional objection is the problem right?

MR. McNALLY: That's correct; that's correct. And we believe that we've dealt with some of these –

JUSTICE YOUNG: But civil doesn't get at that problem. You're suggested solution doesn't cure the problem.

CHIEF JUSTICE TAYLOR: You can tell them to shut up very nicely (inaudible).

MR. McNALLY: I think some of the other language that we proposed further down in the rule does deal with that issue about what the deponent and the attorney can do with conferring with each other. We just thought that this was going to be a window for baseless motions to terminate depositions or to go into court to try to limit a deposition, that it was just going to create increased cost for the parties.

CHIEF JUSTICE TAYLOR: Well, I think what Justice Young probably is concerned about is that if you have the wrong word in here when there's an effort to go to the court to get help the fight will be over whether or not I was nice when I gave instructions.

MR. McNALLY: And I understand that.

CHIEF JUSTICE TAYLOR: That's not what you want –

JUSTICE YOUNG: I'm objecting to this question because this deponent has no personal knowledge about the events that you've asked about. That's an instructional objection. It tells your client to shut up because he doesn't have personal knowledge. It doesn't really object to the admissibility of the question, or the permissibility of the question.

MR. McNALLY: And I think what we've done further down in some of the additional provisions that we've provided is putting some limitations on what –

JUSTICE YOUNG: How does civil advance this – well, if you've got other things – how does changing argumentative to civil advance anything is what I'm asking?

MR. McNALLY: Well, the other provisions do advance that.

JUSTICE YOUNG: Well, okay, just talk about those.

MR. McNALLY: Well, but what I'm worried – I mean with that language we were very concerned that that would just create litigation that being kind of an opportunity for counsel to make you know to try to go in and make a motion to terminate or limit a deposition based upon what they believed was an argumentative objection.

JUSTICE YOUNG: Okay.

MR. McNALLY: Does the Court have any other questions?

CHIEF JUSTICE TAYLOR: All right. Let's move on to number 9 the district court juries.

ITEM #9 – 2007-21 – MCR 2.510 – DISTRICT COURT JURIES

CHIEF JUSTICE TAYLOR: You are a very protean witness I must say.

MR. McNALLY: Thank you Mr. Chief Justice. Once again Sean McNally appearing on behalf –

CHIEF JUSTICE TAYLOR: You must have been up very late last night –

MR. McNALLY: What's that? Sean McNally appearing on behalf of the Civil Procedure and Courts Committee to the State Bar of Michigan. The committee believes this is a sensible change they support it, and if the Court has any questions I'd be happy to answer it.

CHIEF JUSTICE TAYLOR: Thank you. Do you have anything else you want to testify about? Okay. We will stand in recess.

MR. McNALLY: Thank you.